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Nos. 03-334 and 03-343

IN THE

Supreme Court of the United States

SHAFIQ RASUL ET AL.,

Petitioners,

v.

GEORGE W. BUSH ET AL.,

Respondents.

FAWZI KHALID ABDULLAH FAHAD AL ODAH ET AL.,

Petitioners,

v.

UNITED STATES ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE COMMONWEALTH LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The *amicus*, the Commonwealth Lawyers Association ("the CLA") is a body dedicated to the rule of law throughout the Commonwealth.[2] All Law Societies and Bar Associations of the 53 countries comprising the Commonwealth are institutional members of the CLA.

Three signatories to this brief are practicing members of the English Bar. Colin Nicholls, Q.C., is the President of the CLA, and he has signed the brief with the full authority of the Council of the CLA.

The Petitioners who are seeking to appeal the judgment of the United States Court of Appeals for the District of Columbia Circuit include two citizens of the United Kingdom and two citizens of Australia, member states of the Commonwealth.[3] Other Petitioners are nationals of Kuwait, a state which like the United Kingdom and Australia is friendly to the United States.[4]

This brief is submitted in support of the Petitioners, but the CLA wishes to make it clear at the outset that it does not presume to examine or comment on the judgment of the Court of Appeals in this case or the judgment of this Court in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950). The main purpose of this brief is to explain the basis on which the courts of the United Kingdom exercise jurisdiction in habeas corpus.

We hope this may assist this Court for the following reasons:

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[1]No counsel for any party authored this brief either in whole or in part, and no persons other than the *amicus curiae* and its legal counsel made any monetary contribution to its preparation or submission. The parties' written consents to the filing of this brief have been filed with the Clerk.

[2]The Commonwealth is a voluntary association of 53 independent sovereign States. Its 1.7 billion people account for 30 per cent of the world's population.

[3]Pet., No. 03-334, at 2.

[4]Pet., No. 03-343, at 1.

a) the writ of habeas corpus has its origin in England;
b) in *Johnson* v. *Eisentrager* the Supreme Court referred to the English origins of habeas corpus and the harmony between the relevant laws of the two jurisdictions;[5]
c) because of Britain's history as an imperial power, issues of territorial jurisdiction in habeas corpus have not infrequently arisen in the High Court in England in relation to territories outside the United Kingdom, including territories over which the United Kingdom did not assert sovereignty but, over which, through its own executive officers, it exercised power and control.

SUMMARY OF THE ARGUMENT

In the English courts neither the nationality of the detained person, nor the existence of sovereignty in the detaining State over the territory in which the person is detained, determine the availability of the writ of habeas corpus. It has, furthermore, been clear that this has been the case under English law since at least 1772.[6] The determining factors are and have

[5]339 U.S. at 779. See also *Fay* v. *Noia*, 372 U.S. 391, 399–400 (1963), where the Court, per Brennan J., spoke of the "extraordinary prestige of the Great Writ" in Anglo-American jurisprudence and its "Anglo-American" development and also stated (at 401): "It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and of liberty clash most acutely, not only in England in the seventeenth century, but also in America from our very beginnings, and today."

[6]As we explain below, *Sommersett's Case*, 20 State Trials 1 (1772), established that habeas corpus is available to British nationals and others alike, and the Habeas Corpus Act, 1679, and *Rex* v. *Cowle*, 2 Burr. 834, 97 Eng. Rep. 587 (K.B. 1759), removed any doubt that the Court's jurisdiction to issue the writ extended to detentions overseas and to any place "under the subjection of the Crown of England." Subjection in this context implied no more than actual control and power, not technical sovereignty: "'Subjection' is fully appropriate to the powers exercised or exercisable by this country [*i.e.*, the United Kingdom] irrespective of territorial sovereignty or dominion, and it embraces in outlook the power of the

been, rather, whether the respondent to the writ possesses the actual power of detention or release, whether that respondent is subject to the jurisdiction of the court, and, in the case of distant territories, whether there is a local court with power to grant the remedy.

Accordingly, subject to the assumptions that—

a) the Petitioners are not enemy aliens;[7]
b) they are not admitted or clearly shown to be prisoners of war in terms of the Geneva Convention (III) Relative to the Treatment of Prisoners of War;[8]
c) there is no court in Guantanamo Bay with power to grant and enforce the writ of habeas corpus;

if it were the United Kingdom and not the United States which controlled Guantanamo Bay Naval Base and held the Petitioners in detention on the same basis and with the same powers as does the United States, English courts having jurisdiction over the Respondents would assume jurisdiction to issue writs of *habeas corpus*, whatever the nationality of the Petitioners. We believe that the same position would also apply in the courts of the Commonwealth, were any other Commonwealth State to be in control of the Guantanamo Bay Naval Base.

We emphasise that this is not to say that an English or Commonwealth court would necessarily set the Petitioners at liberty. But it would, on the return to the writ, examine their

Crown in the place concerned." *Ex parte Mwenya*, [1960] 1 Q.B. 241, 310 C.A.), per Lord Justice Sellers, discussed *infra*.

[7]As we shall explain in Part V below, as a matter of English law, the question whether a detained person is properly to be categorized as an enemy alien is a matter within the jurisdiction of the Court and to be determined by the Court and not by the Executive.

[8]This Convention provides its own remedies for persons held as prisoners of war, but who dispute that classification. Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Pet., No. 03-334, at 69a, 70a).

status and the circumstances of their detention, and determine whether their detention was justified.

ARGUMENT

I. The origins and history of the writ of habeas corpus illustrate the importance of the writ and the breadth of protection it affords.

The origins of the writ of habeas corpus in England and the Commonwealth may be found in *Magna Carta*. Article 1 of *Magna Carta* states that all the freedoms set out therein were "given to all the free-men of our realm, for us and our Heirs for ever," and Article 29 provides that "no Freeman shall be taken, or imprisoned, or be dispossessed of his Freehold, or Liberties, or free Customs, or be outlawed or exiled, * * * but by lawful Judgment of his Peers, or by the Law of the Land."[9] A Divisional Court of the Queen's Bench has recently endorsed the following statement as accurately reflecting the writ's present-day significance in English law:

> "[*Magna Carta*] becomes and rightly becomes a sacred text, the nearest approach to an irrepealable 'fundamental statute' that England has ever had. * * * For in brief it means this, that the king is and shall be below the law."[10]

It appears that it was in the sixteenth century that the writ of habeas corpus first began to be used as a means of testing the validity of executive committals.[11]

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[9]*Magna Carta* arts. 1 & 29, 1 Stat. at Large (Runnington rev. to Ruffhead ed., London, Charles Eyre *et al.* 1786).

[10]1 Frederick Pollock & Frederic W. Maitland, The History of English Law 173 (2d ed. 1923), cited and quoted with approval by Lord Justice Laws in *Regina (Bancoult)* v. *Secretary of State for Foreign and Commonwealth Affairs*, [2001] Q.B. 1067, 1095 (Q.B.D. Admin. Ct.).

[11]R.J. Sharpe says in the leading textbook on the subject, The Law of Habeas Corpus (2d ed. 1989), at 7: "By the time of Elizabeth [I], it was becoming clear that the claim to a power to commit for reasons of state could be tested on habeas corpus. There are cases as early as 1567 in which habeas corpus was used by persons detained by order of the Privy Council to obtain their release on bail."

In 1640 the English Parliament made its first express attempt to curtail the power of executive detention. Section VIII of the Habeas Corpus Act of 1640, 16 Car. 1, c. 10, provided that "any Person" imprisoned by order of the King or his Council should have habeas corpus and be brought before the court without delay with the cause of imprisonment shown. The Act was passed against the background of the first case of major constitutional importance to address the question of habeas corpus, *Darnel's Case*, 3 State Trials 1 (K.B. 1627).[12] Although now repealed, the Act's wording is notable in that it attributes no significance to either the location of the detained person or his nationality. The right arose purely by virtue of the detention by the King or his Council.

In 1679 a second Habeas Corpus Act, 31 Car. 2, c. 2, was passed. The background to the Act lay in practices which had grown up designed to circumvent the protection afforded by the writ. Prisoners were moved from gaol to gaol so that it was impossible to serve the proper gaoler with the writ and some prisoners were removed overseas, giving rise to practical difficulties in terms of communication (between the detained person and those acting on his behalf), service (on the relevant gaoler), and enforcement of the writ (by produc-

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[12]In *Darnel's Case*, the King, Charles I, had imprisoned five Knights as a result of their refusal to contribute to the repayment of a forced loan he had taken out. The Knights sought their freedom by issue of writs of habeas corpus and, in response, the King simply asserted (at 33) that they had been detained "*per speciale mandatum domini regis*." The issue in the case was whether the Court was required to assume that there was substantive legal justification for the imprisonment or whether the failure to disclose specific grounds entitled the prisoners to be bailed pending trial. The Court ruled in favour of the King and refused to bail the Knights. The Habeas Corpus Act of 1640 in effect reversed that decision.

tion of the detained person) if the writ was issued.[13] The terms of the Act were designed to counter these stratagems. They also made it clear that the territorial scope of the protection afforded by habeas corpus was intended to be broad and removed any doubt that the Court's jurisdiction to issue the writ extended to detentions overseas. The preamble to the Act described it as "An Act for the better securing the Liberty of the Subject, and for Prevention of Imprisonment beyond the Seas." Section XI expressly declared that the writ would run overseas by declaring that it "may be directed and run" to Jersey and Guernsey.[14] Section XII made it an offence to remove detained persons to "Scotland,[15] Ireland, Jersey, Guern-

[13]Twelve years earlier in 1667 one of the charges made against Edward Hyde, the First Earl of Clarendon and Lord Chancellor, on his impeachment was that he had attempted to preclude access to the writ of habeas corpus by sending persons "to be imprisoned against law in remote islands, garrisons, and other places, thereby to prevent them from the benefit of the law." See *Proceedings in Parliament against Edward Earl of Clarendon, Lord High Chancellor of England, for High Treason, and other High Crimes and Misdemeanours: 15 and 19 Charles II. A.D. 1663-1667*, 6 State Trials 291, 330, 396 (1668).

[14]This was consistent with the fact that the Courts had already recognized, or would very shortly recognize, that the writ could run to the Channel Islands, Ireland, and Calais: *The King* v. *Salmon*, 2 Keble 450, 84 Eng. Rep. 282 (K.B. 1669) (re the Channel Islands); *Anonymous*, 1 Ventris 357, 86 Eng. Rep. 230 (K.B. 1681) (re Ireland, Calais, and the Channel Islands).

[15]The English High Court had never had jurisdiction to send the writ to Scotland because of the formal distinction between the English and Scottish Crowns and the writ's status as a prerogative remedy of the English Crown. Holdsworth described the practices which the Act sought to counter as including "in the last resort, [removal of the prisoner] out of the jurisdiction of the court." 9 W.S. Holdsworth, A History of English Law 116 (3d ed. 1944). This may be taken to be a reference to removals to Scotland and other such places and not as suggesting any wider limitation to the jurisdiction of the court whenever a prisoner is confined outside of England. Thus Holdsworth states (at 124) that "[i]t was a well-established principle that, though the writ could not issue into the foreign dominions of a prince who succeeded to the throne of England, and therefore not into

sey, Tangier, or into Parts, Garrisons, Islands or Places beyond the Seas, which are or at any time hereafter shall be *within or without* the Dominions of his Majesty." (Emphasis added.) Section XII also went on to state that any such imprisonments would be illegal and would give rise to an action for false imprisonment.

The Habeas Corpus Act of 1816, 56 Geo. 3, c. 100, was the next significant development. It empowered the court to inquire into the truth of facts averred in the return to the writ and, in cases of doubt as to their accuracy, to grant the detained person bail,[16] and it specified that "non-obedience" to the writ of habeas corpus was a contempt of court.[17]

Scotland or Hanover, it could issue into any other part of the king's dominions." Holdsworth summarises (at 118) the effect of the 1679 Act as having made "the writ of *Habeas Corpus ad subjiciendum* the most effective weapon yet devised for the protection of the liberty of the subject" and describes the success of the Act in effecting its object as being "illustrated by the desire of James II. to get it repealed." He notes (at 118 n.10) that in October 1685 Barillon wrote to Louis XIV that James "designed to obtain from the Parliament a repeal of the Test and Habeas Corpus Acts, the first of which is the destruction of the Catholic Religion, and the other of the royal authority."

[16]Sections 3–4.

[17]Section 2. Another Act passed in 1816 also owed its origins to the law of habeas corpus. It was entitled "An Act for the more effectually detaining in Custody *Napoleon Buonaparté*," 56 Geo. 3, c. 22 (1816) (Eng.), and was passed specifically to render lawful the continued detention of Bonaparte notwithstanding the end of the Napoleonic wars by deeming him to be a "Prisoner of War" and so to have no right to habeas corpus. See 1 Arnold Duncan, Lord McNair, International Law Opinions 104–07 (1956), explaining the origins of the Act and how Admiral Lord Keith (the commander in chief of the English Channel fleet) had been "'chased all day by a lawyer with a *Habeas Corpus*!'" *Id.* at 105 (citation to internal quotation omitted). It is important to note that it was not open to the Executive simply to declare Bonaparte to be a Prisoner of War, and that the intervention of Parliament by specific legislative enactment was required. The 1862 Habeas Corpus Act, 25 & 26 Vict., c. 20, is also of significance and is referred to below.

Over the last four centuries English judges and lawyers have repeatedly emphasized the importance of the writ of habeas corpus and its fundamental purpose—namely to provide a speedy and effective means to test the lawfulness of any detention and thus to protect the liberty of the individual; and the jurisdiction of the High Court in England to grant the writ has been consistently recognized as extending to any part of the King's dominions. Blackstone described the writ thus:

> "[T]he great and efficacious writ in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum*; * * *. This is a high prerogative writ, * * * running into all parts of the king's dominions: for the king is at all times intitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted."[18]

The breadth of the remedy was reaffirmed in the House of Lords by the Earl of Birkenhead in *Secretary of State for Home Affairs* v. *O'Brien*, [1923] A.C. 603 (appeal taken from Eng.), when he said the following (at 609):

> "We are dealing with a writ antecedent to statute, and throwing its root deep into the genius of our common law. The writ with which we are concerned to-day was more fully known as habeas corpus ad subjiciendum. * * * It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I. It has through the ages been jealously maintained by Courts of Law as a check upon the illegal usurpation of power by the Executive at the cost of the liege."

[18]3 William Blackstone, Commentaries *131.

II. As a matter of English law the writ of habeas corpus will not be refused to any person within the jurisdiction of the Crown on the ground that he or she is an alien.

Innumerable judicial statements to the same effect as that made by the Earl of Birkenhead could be cited. In some of them the right to liberty which is protected by the writ has been described as a right of "the subject," "the liege," or "the citizen." It has, however, long been accepted that the remedy is equally available to aliens.[19] In the case of *Khera* v. *Secretary of State for the Home Dep't* and *Khawaja* v. *Secretary of State for the Home Dep't*, [1984] A.C. 74 (appeal taken from Eng.), the applicants for habeas corpus were, respectively, an Indian national and a Pakistan national, held in the United Kingdom pending their removal pursuant to orders made by an immigration officer. In the course of his judgment (with which, on this point, none of the other members of the House of Lords disagreed), Lord Scarman stated that the question of a detained person's nationality is irrelevant to his right to the writ of habeas corpus. He said (at 111–12):

> "Habeas corpus protection is often expressed as limited to 'British subjects.' Is it really limited to British nationals? Suffice it to say that the case law has given an emphatic 'no' to the question. Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection. This principle has been in the law at least since Lord Mansfield freed 'the black' in *Sommersett's Case* (1772) 20 St. Tr. 1. There is nothing here to encourage in the case of aliens or non-patrials the implication of

[19]Other than enemy aliens (as to whom see note 7 *supra* and Part V below) and prisoners of war to whom different considerations have been held to apply (as to which see note 8 *supra*).

words excluding the judicial review our law normally accords to those whose liberty is infringed."

Other cases illustrating the irrelevance of nationality in habeas corpus are referred to below. The signatories to this brief know of no English or Commonwealth case where the writ has been refused to any person within the jurisdiction of the Crown on the ground that he or she is an alien.

III. The writ of habeas corpus is a flexible remedy adaptable to changing circumstances.

Consistent with its underlying purpose the writ of habeas corpus has always been treated as a flexible remedy. In the context of the Court's powers to issue the writ to prevent removal of a foreign immigrant seeking to challenge deportation, Lord Justice Taylor (later the Lord Chief Justice of England and Wales) observed in *Regina* v. *Secretary of State for the Home Dep't, ex parte Muboyayi*, [1992] Q.B. 244, 269 (C.A.):

> "The court must inherently have the power to prevent its decision from being pre-empted by administrative action. The great writ of habeas corpus has over the centuries been a flexible remedy adaptable to changing circumstances."

IV. As a matter of English law, jurisdiction for the purposes of the writ of habeas corpus is established when the detained person is placed under the control of the Crown or enters territory under the Crown's control whether or not the Crown claims sovereignty over that territory.

In the passage from the *Khawaja* decision quoted above Lord Scarman said that the writ was available to "[e]very person within the jurisdiction." Although the *Khawaja* case related to an individual within the United Kingdom, the central question, as Lord Scarman indicated, was whether the individual seeking to invoke the remedy of habeas corpus could be said to be "within the jurisdiction" of the United Kingdom. As a matter of English law "jurisdiction" in this context is established when the individual is placed under the control of the Crown or enters territory under the Crown's control. What is determinative in habeas corpus jurisdiction is whether the officers of state to whom the writ is directed have effective control over the detained person, and whether those officers are themselves subject to the jurisdiction of the court. If the United Kingdom Parliament has assumed power to make laws applicable to a particular territory or if the United Kingdom Executive has applied and enforced United Kingdom law there, then there is no doubt that that territory would be regarded as being within United Kingdom jurisdiction. See, *e.g.*, *The King* v. *The Earl of Crewe, ex parte Sekgome*, [1910] 2 K.B. 576, 606 (C.A.), per Vaughan Williams, L.J., discussed *infra*.

That the English Courts in exercising this jurisdiction have looked to actual control over territory and not to concepts of legal sovereignty is evidenced by a line of cases extending over two and a half centuries. We refer to the principal cases below.

***Rex* v. *Cowle*, 2 Burr. 834, 97 Eng. Rep. 587 (K.B. 1759):**

The issue in this case was whether the writ of habeas corpus could issue to Berwick which had been acquired by conquest from Scotland, but not formally incorporated within England, and which remained governed by its own charter. Lord Mansfield, Chief Justice, giving the judgment of the Court did not find it necessary to determine the precise legal status of Berwick. He held that:

> "Writs * * * such as writs of * * * habeas corpus * * * are restrained by no clause in the constitution given to Berwick: upon a proper case, they may issue to every dominion of the Crown of England.

> "There is no doubt as to the power of this Court; where the place is under the subjection of the Crown of England * * *." 2 Burr. at 855–56, 97 Eng. Rep. at 599.

"Dominion" in 1759 had no technical meaning. Nor was "subjection" in this context a technical term. It implied no more than actual control and power. In *Ex parte Mwenya*, [1960] 1 Q.B. 241, 310 (C.A.), (to which we shall return in more detail below), Lord Justice Sellers said of this statement of Lord Mansfield:

> "Lord Mansfield gave the writ the greatest breadth of application which in the then circumstances could well be conceived. * * * 'Subjection' is fully appropriate to the powers exercised or exercisable by this country irrespective of territorial sovereignty or dominion, and it embraces in outlook the power of the Crown in the place concerned."

***Ex parte Anderson*, 3 El. & El. 487, 121 Eng. Rep. 525, 30 L.J.Q.B. 129 (Q.B. 1861):**

In this case the English High Court issued a writ to the sheriff of the County of York in Canada, and to the keeper of the gaol of Toronto in that county, to bring up the body of an American slave, John Anderson.[20] In granting the writ Chief Justice Cockburn acknowledged that the colony had both legislative and judicial independence, but continued as follows:

> "Nevertheless, it is to be observed that, in establishing a local judicature in Canada, our Legislature has not gone so far as expressly to abrogate the right of the superior Courts at Westminster to issue the writ of habeas corpus to that province * * *. [W]rits of habeas corpus have

[20]Although described in the judgment as a "British subject," Anderson was a slave from Missouri who had fled to Canada. See 5 Judicial Cases Concerning American Slavery and the Negro 345–47 (Helen Tunnicliff Catterall & James J. Hayden eds., Octagon Books 1968) (1937).

> been and may be issued into all parts of the dominions of the Crown of England, wherever a subject of the Crown is illegally imprisoned or kept in custody. * * * [A]nd as the writ has issued even into dominions of the Crown in which there is an independent local judicature; we think that nothing short of legislative enactment would justify us in refusing to exercise the jurisdiction, when called upon to do so for the protection of the personal liberty of the subject." 3 El. & El. at 494, 121 Eng. Rep. at 527–28.

This decision illustrated the broad territorial scope of the writ of habeas corpus. Moreover, as Anderson was an American slave, it is evident that the use of the term "subject" was not equated with the status of citizenship.

The Habeas Corpus Act of 1862, 25 & 26 Vict., c. 20, was passed in response to the controversy in Canada created by the decision in *Ex parte Anderson*.[21] It was described by its preamble as "An Act respecting the Issue of Writs of Habeas Corpus out of *England* into Her Majesty's Possessions Abroad." Section 1 provided that:

> "No Writ of Habeas Corpus shall issue out of *England*, by Authority of any Judge or Court of Justice therein, into any Colony or Foreign Dominion of the Crown where Her Majesty has a lawfully established Court or Courts of Justice having Authority to grant and issue the said Writ, and to ensure the due Execution thereof throughout such Colony or Dominion."

The Act makes it clear that if the local courts in a British colony or "Foreign Dominion"[22] could not effectively issue

[21]David Clark & Gerard McCoy, The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth 158 (2000).

[22]"Foreign Dominion" is an unusual phrase. It has been held to mean "some territory which at some time formed part of the dominions of some foreign potentate, but which has now become, by conquest or cession, part of the dominions of the Crown of England." See *Ex parte Browne*, 5

and enforce the writ, the High Court in England retained the power to do so, emphasising the Crown's broad jurisdiction over habeas corpus and recognizing the fundamental need for at least one court to exist that can "ensure the due Execution" of the writ in any place under British control.

Notwithstanding the 1862 Act, *Ex parte Anderson* remains authority for the proposition that the writ is available to citizens and non-citizens alike and for cases where there is no local court capable of granting or issuing the writ.[23]

***The King* v. *The Earl of Crewe, ex parte Sekgome*, [1910] 2 K.B. 576 (C.A.):**

This case related to the English Court's jurisdiction to issue a writ of habeas corpus to the Protectorate of Bechuanaland. The Protectorate was not part of the Crown's dominions within the meaning of the 1862 Act,[24] nor did the British Government assert sovereignty over it. It did, however, control and administer the territory. On the evidence of the Secretary of State for the Colonies it was merely a "foreign country within which [the Crown] had power and jurisdiction by treaty, grant, usage, sufferance, or other lawful means * * * [and] that it had never been acquired by settlement, or ceded to, or conquered, or annexed by His Majesty or any of his

B.&S. 280, 10 L.T.R. 458, 459 (Q.B. 1864), per Cockburn C.J.; Kenneth Roberts-Wray, Commonwealth and Colonial Law 76–77 (1966).

[23]One obvious illustration of the continued importance of *Ex parte Anderson* as an authority is the case of *Ex parte Sekgome*, to which we turn next. In his judgment Vaughan Williams, L.J., cited the case as support for his conclusions that the writ of habeas corpus could run to "any country or place under the subjection of the Crown of England." [1910] 2 K.B. at 592, 605, 606. See also the reliance placed on *Ex parte Anderson* by Lord Evershed, M.R., in *Ex parte Mwenya*, [1960] 1 Q.B. at 293–94, and, in the same case, by Lord Justice Sellers, *id.* at 308–09, discussed *infra*.

[24]See [1910] 2 K.B. at 591–92, per Vaughan Williams, L.J., and at 622–23, per Kennedy, L.J.

Royal predecessors * * *."[25] The writ was sought on behalf of an individual who claimed to be the chief of a native tribe but nevertheless a British subject. Counsel for the Respondent—the Secretary of State for the Colonies—conceded that it was immaterial whether or not the applicant was a British subject.[26] The Court nevertheless considered that concession to have been well-founded and to accurately represent the law.[27] Moreover, the majority (Lord Justice Vaughan Williams and Lord Justice Farwell[28]) held that the writ ran to the Protectorate, notwithstanding that it was not a British colony or dominion.

Lord Justice Vaughan Williams indicated that it was the fact of presence in territory under the control of the State and the assertion of power over the individual by the State—not sovereignty or nationality based ties to the State—which triggered the protection of the writ. He said (at 592) that "the writ may be addressed to any person who has such control over the imprisonment that he could order the release of the prisoner." Later he added (at 606):

> "In the present case the King has every means of enforcing obedience. The Crown * * * has established laws which the dwellers in the Protectorate, whether natives or mere residents, must obey, and from which they surely must be entitled to receive protection when injured. Is the mere fact of absence of annexation and theoretical possession to deprive the Crown and those who are under the law from the benefits and power of the writ of habeas?"

Lord Justice Farwell also indicated that he considered the crucial issue to be control on the part of the proposed

[25]See [1910] 2 K.B. at 577.

[26]See *id.* at 580.

[27]See, *e.g.*, *id.* at 606, per Vaughan Williams, L.J., and at 620, per Kennedy, L.J.

[28]Kennedy, L.J, dissented on this point at 624.

respondent rather than the precise legal status of the territory where the applicant was detained. He said the following (at 618):

> "Where a man who owes obedience to laws imposed by England is imprisoned and kept imprisoned without trial in a place maintained by England, and placed under the control of an officer of the Crown who acts under the orders of the Colonial Office, and who has acted in the particular case with the assent and approval of and is supported by the Colonial Office, I should be slow to conclude that the Secretary of State could not be called on to make a return to the writ."

Lord Justice Kennedy (who rejected the availability of the writ on different grounds) stated, however, that he considered that the question as to whether or not the applicant was a British subject was an irrelevance, and that the key issue was whether or not he was detained under British authority.[29] He said:

> "In my opinion the mere fact that a person in detention ought to be considered as not being in the strict sense of the term a British subject could not in itself be treated as impairing the jurisdiction of the High Court of Justice to direct the issue of the writ, if it were shewn that his custodian was detaining him within a British dominion and claiming so to detain him in the exercise of powers conferred upon him by British jurisdiction. The remedy obtainable by the writ of habeas corpus is not confined to British subjects. * * * [If] Gaberones, where Sekgome is

[29]Lord Justice Kennedy (at 624) held that the writ could not be issued beyond territories which were formally "dominions" of the Crown, but in this respect as we have already indicated he was alone—Lord Justice Vaughan Williams and Lord Justice Farwell preferred the opposite conclusion. See *id.* at 592, 605–06, per Vaughan Williams, L.J., and at 618, per Farwell, L.J.

> detained, can rightly be held to be within the foreign dominions of the Crown, I do not think that the jurisdiction of the High Court of Justice to issue the writ of habeas corpus could be affected in any way by the fact that Sekgome is not a British subject." *Id.* at 620–21.

***The King* v. *Secretary of State for Home Affairs, ex parte O'Brien*, [1923] 2 K.B. 361 (C.A.):**

In this case the applicant, O'Brien, was said to be a ringleader of an illegal organization which had as its purpose the overthrow of the Governments in Southern and Northern Ireland and the commission of acts of violence in England. O'Brien was arrested in London and sent by the British authorities to Mountjoy Prison in Dublin in the Irish Free State where he was detained. The Irish Free State was then a self-governing British Dominion with its own parliament and executive. O'Brien applied to the High Court in London for a writ of habeas corpus. The writ was refused by the Divisional Court but granted by the Court of Appeal. Notwithstanding the fact that the respondent—the Secretary of State—had lost legal control over O'Brien by handing him over to the Irish Free State Government, the Court of Appeal held that there was sufficient doubt whether the Secretary of State nonetheless retained de facto control to justify the issue of the writ so that the question of control might be definitively determined on the return. Lord Justice Atkin summarized the matter in the following passage (at 397–98):

> "Having come to the definite conclusion that the order made by the Home Secretary is invalid and that the imprisonment of the applicant thereunder is unlawful, it only remains to consider whether the writ should go to the Home Secretary. I think that the question is whether there is evidence that the Home Secretary has the custody or control of the applicant. Actual physical custody is obviously not essential. 'Custody' or 'control' are the

phrases used passim in the opinions of the Lords in *Barnardo* v. *Ford* [[1892] A.C. 326)], and in my opinion are a correct measure of liability to the writ. It was said that the Applicant was in a dilemma, for having relied on the absence of control as constituting the invalidity of the order he is said to debar himself from asking that the writ should go to the Home Secretary as having control, and the Attorney General relied upon the absence of control as fatal to the applicant's motion for the writ. In truth there seems to be no dilemma. In testing the validity of the order [of detention] the question is as to the legal right to control; in testing the liability of the respondent to the writ the question is as to de facto control. In all cases of alleged unjustifiable detention such as arise on applications for the writ of habeas corpus the custody or control is ex hypothesi unlawful; the question is whether it exists in fact."[30]

The case of *Barnardo* v. *Ford*, [1892] A.C. 326 (appeal taken from Eng.), to which Lord Justice Atkin referred, concerned an application for habeas corpus in respect of a child and directed to Dr Barnardo, the head of an institution for destitute children in which the child had been placed. It appeared that before the proceedings began Dr Barnardo had handed the child over to another person to be taken to Canada, and he alleged that he did not know the address of that person or where the child was and that there being no relevant control there was therefore no jurisdiction for the issue of the writ. The High Court, Court of Appeal, and

[30]See also [1923] 2 K.B. at 381, per Lord Justice Bankes, and at 391–92, per Lord Justice Scrutton. Most English lawyers would agree that these three Lord Justices constituted the most powerful English Court of Appeal of the first half of the 20th Century.

House of Lords nevertheless considered that the issue of the writ of habeas corpus was appropriate.[31]

***Ex parte Mwenya*, [1960], 1 Q.B. 241 (C.A.):**

This case concerned the jurisdiction of the High Court in England to issue a writ of habeas corpus to the Protectorate of Northern Rhodesia. Like Bechuanaland in Sekgome's case Northern Rhodesia was described as a "'foreign country within which Her Majesty has power and jurisdiction by treaty, grant, usage, sufferance and other lawful means,'"[32] and where, for the purposes of the argument, it was assumed that there was no court in Northern Rhodesia competent to give equivalent relief.[33] The Crown submitted that the only test for

[31] The leading judgment in the House of Lords was that of Lord Herschell. He stated as follows (at 339):

> "Where any tribunal believes that a person is or *may be* [emphasis added] under detention in unlawful custody, and issues a writ of habeas corpus accordingly, no Court of Appeal ought lightly to interfere with the issue of the writ. The order for its issue ought only to be set aside if there be, beyond question, no ground for it. If, for example, in the present case it had been an admitted fact that before notice of the application for the writ the appellant had ceased to have the custody of or any control over the boy alleged to be detained, that might have been ground for reversing the order of the Queen's Bench Division. But where the Court entertains a doubt whether this be the fact [*i.e.*, whether custody or control has ceased prior to the application for issue of the writ], it is unquestionably entitled to use the pressure of the writ to test the truth of the allegation, and to require a return to be made to it."

In holding that the Court had jurisdiction to determine whether control was in fact established so as to justify the issue of the writ, the House of Lords' decision also provides support for the analogous position we set out below relating to the Court's jurisdiction to determine the existence or otherwise of enemy alien status for the purposes of determining jurisdiction to issue the writ.

[32]See [1960] 1 Q.B. at 265, quoting affidavit.

[33]See judgment page, *id.* at 290.

the availability of the writ was one of territorial sovereignty[34] and that that test was failed on the facts of the case. Each member of the English Court of Appeal rejected this argument, concluded that the writ of habeas corpus could issue to any place under the "subjection" of the Crown and emphasized the necessity of considering the actual nature of the Crown's control over the territory in question, and so over the detention under challenge. The following were the key passages in the judgments:

> "As a matter of history and logic, the availability of the 'most efficient protection ever invented for the liberty of the subject' should not depend upon a mere label or on matters of convenience. * * *
>
> "* * * [T]he jurisdiction ought not to be limited to territories, outside England, which are strictly labelled 'colonies or foreign dominions' but will extend to territories which, having regard to the extent of the dominion in fact exercised, can be said to be 'under the subjection of the Crown' and in which the issue of a writ will be regarded (in Lord Mansfield's words) as 'proper and efficient.'" [1960] 1 Q.B. at 303, per Lord Evershed, M.R.[35]
>
> "[I]n territory in which the Crown, on the advice of Parliament, has assumed such a degree of power and control that the protected State is to all intents and purposes a British possession and in which the writ, if issued, would certainly be effective in its results, it is difficult to see why the sovereign should be deprived of her right to be informed through her High Court as to the validity of the detention of her subjects in that territory. The contrary view would result in a subject having no redress at all if he were detained, however unlawfully, in a protectorate

[34]See argument of Counsel for the Secretary of State, *id.* at 285.

[35]See also Lord Evershed, M.R., *id.* at 297, and Lord Justice Romer, *id.* at 305.

> which was in substance a colony but which had no effective courts of its own." *Id.* at 305, per Lord Justice Romer.
>
> "There may come times in a country's history when it may appear highly inconvenient or politically hazardous that the law should pursue its course, but in a court of law such considerations are irrelevant and cannot serve to deprive a subject of a right which an English court could give and enforce.
>
> "* * * *
>
> "* * * The writ is concerned with personal freedom and the emphasis in principle, it would seem, is not on where the wrongful detention is occurring but, assuming the court is satisfied that the detention is without justification whether it can, having regard to the proper interests, rights and powers of those governing the place of detention, make an order which can be enforced and so release an applicant who has asked for justice before it.
>
> "* * * *
>
> "The judges in the earliest cases had not in mind the issue which arises here, but I think it would be difficult to read into any of them * * * a refutation of the powers of the English Court to issue the writ to safeguard a subject's freedom in a territory over which this country had wide powers of jurisdiction and control, wide enough to enforce as a matter of ordinary administration any order the court might make." *Id.* at 308–09, per Lord Justice Sellers.[36]

[36]Another case decided prior to 1960 to which we should refer is *In re Ning-Yi-Ching*, 56 T.L.R. 3 (K.B. 1939). This was a first instance Vacation Court decision, and it has sometimes been cited as support for the contention that the writ of habeas corpus does not run to foreigners in foreign territory. We do not, however, believe that the case was correctly decided or that it can stand with the appellate decisions we refer to. The judge, Mr. Justice Cassels, purported to follow the judgment of Lord

***Regina (Bancoult)* v. *Secretary of State for Foreign and Commonwealth Affairs*, [2001] Q.B. 1067 (Q.B.D. Admin. Ct.):**

This case was concerned with the availability of another prerogative writ[37] to a territory under the Crown's "subjection." The Crown submitted that the territory although a colony, enjoyed a separate and distinct sovereignty[38] and that as a result the writ of the High Court in London could not run there. Lord Justice Laws and Mr. Justice Gibbs rejected this

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Justice Kennedy in *Ex parte Sekgome*. Mr Justice Cassels overlooked, however, both the fact that Lord Justice Kennedy was in the minority and the fact that Lord Justice Kennedy himself considered the nationality of the detained person to be irrelevant to the jurisdiction to issue the writ. Furthermore the result in the case was explicable by virtue of the fact that, under the treaties governing the concession in Tientsin (*i.e.*, the municipal area in Tientsin allotted to the United Kingdom) in which the detained persons were held, the British authorities had no jurisdiction over non-nationals and that there was another local court before which the detention could be challenged. In any event subsequent decisions have made it clear that Mr Justice Cassels's approach was not correct and is not to be followed. In *Ex parte Mwenya*, Lord Evershed, M.R., considered Lord Justice Kennedy's minority judgment in *Ex parte Sekgome* and its adoption in *In re Ning Yi-Ching* and commented (at 295) "[i]t is nonetheless clear that the other two members of this court took a different view upon this matter" while Lord Justice Sellers also stated (at 310–11) that he agreed with the approach taken by Lord Justice Vaughan Williams rather than Lord Justice Kennedy. The Court of Appeal has therefore held that the views of Mr Justice Cassels and Lord Justice Kennedy did not represent English law. Mr. Justice Cassels's approach is also irreconcilable with the more recent decisions of the Divisional Court in *Regina (Bancoult)*, v. *Secretary of State for Foreign and Commonwealth Affairs*, [2001] Q.B. 1067 (Q.B.D. Admin. Ct.), and the Court of Appeal in *The Queen (on the application of Abbasi)* v. *Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ. 1598, [2002] All E.R. (D) 70 (Nov.), to which we refer in more detail below.

[37]The writ of certiorari to quash an ordinance passed by the Commissioner exercising powers over a British Indian Ocean Territory.

[38]See *id.* at 1072 & 1086, ¶ 21.

argument. Referring to the writ of habeas corpus and to *Ex parte Mwenya*, Lord Justice Laws said:

> "[I]t is plain that the court in *Ex p Mwenya* * * * saw nothing in any earlier jurisprudence * * * to inhibit them from concluding that the writ of habeas corpus might in a proper case issue beyond the seas, 'to any place under the subjection of the Crown.' Indeed the weight of authority pointed firmly towards just such a conclusion."[39]

In reaching this conclusion Lord Justice Laws expressly endorsed the dictum of Lord Justice Farwell in *Ex parte Sekgome* (at 618) cited above.

***The Queen (on the application of Abbasi)* v. *Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ. 1598, [2002] All E.R. (D.) 70 (Nov.):**

This case was brought in the English courts on behalf of a British national captured by United States forces in Afghanistan and held at Guantanamo Bay since January 2002. He sought an order to compel the United Kingdom Secretaries of State to make representations on his behalf to the United States Government. His claim was founded on the contention that his "fundamental human right" not to be arbitrarily detained had been infringed because he had been denied access to a court, the United States District Court for the District of Columbia having dismissed habeas corpus applications by other British subjects held at Guantanamo Bay for want of jurisdiction—*Rasul* v. *Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), Pet. App., No. 03-343, at 33. His submission was that in these circumstances the Secretaries of State owed him a duty under English law to take steps to redress the position.

The English Court of Appeal, presided over by the Master of the Rolls, held that the denial of access to a court in Abbasi's case was in conflict with the fundamental principles of

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[39]See *id.* at 1091, ¶ 26.

English law and of public international law. The Court stated its belief that United States law recognized the same principles. The Court emphasised (paragraph 65) that Abbasi's detention as an alleged "enemy combatant" might prove to be justified, and that the United Kingdom also had legislation to deal with suspected international terrorists.[40] Nonetheless the Court said:

> "66. What appears to us to be objectionable is that Mr Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal. It is important to record that the position may change when the appellate courts in the United States consider the matter. The question for us is what attitude should the courts in England take pending review by the appellate courts in the United States, to a detention of a British Citizen the legality of which rests (so the decisions of the United States Courts so far suggest) solely on the dictate of the United States Government, and, unlike that of United States' citizens, is said to be immune from review in any court or independent forum."

In the result the Court of Appeal held that it could not compel the Secretaries of State to intervene by diplomatic or any other means. The judgment is, however, further clear and weighty authority for the propositions that neither the nationality of the detained person nor the absence of sovereignty over the place of detention would preclude an English Court from entertaining a habeas corpus application, provided that the authority in ultimate or actual control of the detained

[40]We understand that the Petitioners deny that they are or have been enemy combatants or members of any terrorist group and that no evidence to the contrary has been disclosed by the United States Government in respect of any of them. Pet., No. 03-334, at 3; Pet., No. 03-343, at 2–3.

person was subject to the Court's jurisdiction. We refer the Court to the whole of the judgment, but for convenience set out some further passages of importance:

> "59. The United Kingdom and the United States share a great legal tradition, founded in the English common law. One of the cornerstones of that tradition is the ancient writ of habeas corpus * * *. The court's jurisdiction was recognised from early times as extending to any part of the Crown's dominions * * *.
>
> "60. The underlying principle, fundamental in English law, is that every imprisonment is prima facie unlawful * * *. This principle applies to every person, British citizen or not, who finds himself within the jurisdiction of the court: 'He who is subject to English law is entitled to its protection' * * *. It applies in war as in peace; in Lord Atkin's words (written in one of the darkest periods of the last war):
>
> > 'In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace.' (*Liversidge v Anderson* [1942] AC 206, 245 [*sic*] at p.244)
>
> "* * * *
>
> "63. The recognition of this basic protection in both English and American law long pre-dates the adoption of the same principle as a fundamental part of international human rights law. * * *
>
> "64. For these reasons we do not find it possible to approach this claim for judicial review other than on the basis that, in apparent contravention of fundamental principles recognised by both jurisdictions and by international law, Mr Abbasi is at present arbitrarily detained in a 'legal black-hole'."

In conclusion (at ¶ 107.iii) the Master of the Rolls said:

"The position of detainees at Guantanamo Bay is to be considered further by the appellate courts in the United States. It may be that the anxiety we have expressed will be drawn to their attention. We wish to make it clear that we are only expressing an anxiety that we believe was felt by the Court in *Rasul*. As is clear from our judgment, we believe that the United States courts have the same respect for human rights as our own."

V. As a matter of English law the question whether a detained person is properly to be categorized as an enemy alien is a matter within the jurisdiction of the Court and to be determined by the Court and not the Executive.

It appears to be common ground between the petitioners and the Government that the petitioners are not "enemy aliens" within the primary meaning of that term.[41] The Government contends, however, that the petitioners are, nevertheless enemy aliens because at the time of their capture they were "actual enemies, active in the hostile service of an enemy power."[42] That assertion is disputed on behalf of the Petitioners, and it is denied that they have ever engaged in hostilities against the United States of America.[43] As a matter of English law the issue thus joined between the parties would fall to be resolved by the Court on the evidence presented. It would not be open to the Executive to contend that this issue was non-justiciable and outside the Court's jurisdiction. We set out below the principal authorities which show this to be the case.

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[41] *I.e.*, citizens of a state at war with the United States. *Johnson* v. *Eisentrager*, 339 U.S. at 769 n.2.

[42] Br. in Opp., Nos. 03-334 & 03-343, at 14.

[43] See *Al Odah* v. *United States*, 321 F.3d 1134, 1140 (D.C. Cir. 2003), Pet. App., No. 03-343, at 11.

***Rex* v. *Schiever*, 2 Burr. 765, 97 Eng. Rep. 551 (K.B. 1759):**

This case related to a Swedish sailor detained in a Liverpool gaol having been captured aboard a French ship. Although England and France were at war, Sweden was a neutral power and the applicant sought a writ of habeas corpus contending that he had been forced to serve on the French vessel under duress. Although the Reporter queried the correctness of the decision where duress was involved, the Court held that on Schiever's "own shewing" he was "clearly a prisoner of war, and lawfully detained as such," 2 Burr. at 766, 97 Eng. Rep. at 552, and the application for the writ was refused. The Court decided the case on the evidence presented and not on the basis of any assertion that Schiever was an enemy alien. There was no suggestion that the Court lacked jurisdiction to consider the evidence and determine Schiever's status on the basis of that evidence.

***Anonymous—The Case of Three Spanish Sailors*, 2 Black. W. 1324, 96 Eng. Rep. 775 (K.B. 1779):**

In this case three Spanish sailors asserted that they had been captured as prisoners of war on board a Spanish privateer and carried to Jamaica. They had then been persuaded to enter into service on board a merchant vessel and promised wages and their release on the vessel's return to England. On arrival in England, however, the Captain of the vessel, a Captain Lush, refused to pay the agreed wages and instead handed the men over to the Commander of a naval vessel as prisoners of war. The Court refused the subsequent application for a writ of habeas corpus but, again, did so on the basis of the evidence presented. The Court rejected the application in the following terms "these men, upon their own shewing, are alien enemies and prisoners of war, and therefore not entitled to any of the privileges of Englishmen; much less to be set at liberty on a habeas corpus. The story, as related by them, is not much to the credit of Captain Lush; but we can give them

no redress." 2 Black. W. at 1324, 96 Eng. Rep. at 776. Again there was no suggestion that the Court lacked jurisdiction to consider the evidence and to determine the sailors' status on the basis of that evidence.

***Ex parte Weber*, [1916] A.C. 421 (appeal taken from Eng.):**

The applicant in this case, Weber, was a German-born man who had left Germany in 1898 and had remained abroad since that time. On the outbreak of the First World War he was interned as an enemy alien. He applied for a writ of habeas corpus contending that as a result of German legislation he had lost his German nationality and so was not an enemy alien. The High Court, Court of Appeal, and House of Lords accepted that the Court had jurisdiction to consider the issue but held, on the evidence, that it could not be said that the applicant had so divested himself of his German nationality that he could be treated as though he no longer remained a German citizen. He remained, therefore, an enemy alien and the writ was refused on the facts.

***The King* v. *Superintendent of Vine Street Police Station, ex parte Liebmann*, [1916] 1 K.B. 268:**

This was another First World War internment case and followed shortly after *Ex parte Weber* had been decided. Although the application was unsuccessful, it represents further authority from the Divisional Court that the English Court does have jurisdiction to determine whether an individual seeking habeas corpus relief is in fact an enemy alien. As Mr Justice Low (with whom Mr Justice Bailache agreed) said (at 277), "The first question we have to determine is whether the applicant is an alien enemy." The judge then went on to recite the facts of the case before concluding that Liebman was indeed an alien enemy. As in Weber's case it was clear that the Court was not simply accepting the assertion made by the Executive to this effect but exercising its own jurisdiction to consider and resolve the issue.

CONCLUSION

If it were the United Kingdom, and not the United States of America, which controlled the Guantanamo Bay Naval Base and the detained persons held there, then, in accordance with English law as it has been since at least 1772, the writ of habeas corpus would be available before the English Courts regardless of the nationality of the detained persons, and it would be the English Courts and not the Executive which would be responsible for determining any issue relating to any "enemy" status alleged against the detained persons. We are, furthermore, unaware of any authority indicating that the position would be any different in any other Commonwealth State.

Respectfully submitted,

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